

**EP/EO REVIEW STAFF
BULLETIN**

Employee Plans X

FY-96 No. 5

Exempt Organizations

Date: 2/16/96

Review Staff has been asked to provide guidance on the following EP determination letter issues. It is hoped that this guidance will help to achieve consistency in reviewing determination cases.

1. Which plans must contain a definition of Highly Compensated Employee?

All plans with 401(k) and/or 401(m) provisions must contain a definition of Highly Compensated Employee. Other plans are not required to define this term. However, if other plans do attempt to define Highly Compensated Employee, the specialist must determine that the language is not correct.

2. What is needed to document timely adoption of a qualified plan?

Option A – The plan document only.

Option B - A board of directors resolution.

Either option A or B is acceptable. As long as the plan document has been reduced to writing, either the plan document's execution page or an appropriate board of directors resolution will suffice.

3. What language must a plan contain in order to satisfy IRC section 401(a)(9) when the plan provides only for a lump sum distribution?

All plans must contain language pertaining to the required beginning date. It is acceptable to answer only the first two questions on checksheet 9.

(Note: The specialist must ensure that the plan provides that any distribution on account of death will be made no later than five years after the death of the participant.)

4. Must a plan use the word “immediately” when defining a Qualified Joint and Survivor Annuity?

The word “immediately” is not required in the definition of a Qualified Joint and Survivor Annuity. However, it must be clear that the payments from the annuity will not be deferred. Once a participant has satisfied plan requirements for distribution, and the distribution is in the form of a Qualified Joint and Survivor Annuity, payments must commence without delay. See the example given in Reg. 1.417(e)-1(b)(1).

5. If a plan offers loans to participants, must the requirements of section 72 (p) be incorporated into the document?

The provisions of 72(p) are not qualification issues and cannot be required in the plan document. However, if the plan contains a joint and survivor annuity and secures the loan with the participants vested accrued benefit, spousal consent must be obtained within the 90-day period ending on the date the loan is secured. The spousal consent requirement is a qualification issue.

While the provisions of 72(p) are not required, it is suggested that if other amendments are requested, this language be requested as well, particularly if the provisions in the plan document would violate 72(p). This would provide added service to taxpayers and would preclude their arguing that they were following a written program that we had approved. This course of action will strengthen our position if any operational problems are discovered during a later audit.